Plaza Properties of Michigan, Inc. a/k/a Plaza Operations, Inc. d/b/a Michigan Inn and Michigan Inn, Incorporated and Plaza Properties, Inc. and J & M Hotel Management Company, L.L.C. d/b/a Clarion Ambassador Hotel a/k/a Michigan Inn *and* Local 24, Hotel Employees and Restaurant Employees International Union, AFL–CIO. Case 7–CA–43711

Grand Pacific Finance Corp. and Grand Pacific Holding Corp. and Southfield Hotel Holdings, Inc. d/b/a Ambassador Hotel & Conference Center and Southfield Hotel Holdings, L.L.C. d/b/a Ambassador Hotel & Conference Center and Global Equities and Loans, Inc. and Local 24, Hotel Employees and Restaurant Employees International Union, AFL–CIO. Case 7–CA–44205

October 31, 2003

ORDER DENYING MOTION

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

The General Counsel seeks a default judgment in this case against certain of the named Respondents on the ground that they have failed to file an answer to the consolidated complaint. Upon a charge and amended charge filed by the Union in Case 7–CA–43711 on January 31, 2001, and September 25, 2002, respectively, and a charge and amended charge filed by the Union in Case 7–CA–44205 on July 16, 2001, and September 25, 2002, respectively, the General Counsel issued the consolidated complaint on September 30, 2002, alleging that the Respondents have violated Section 8(a)(3), (5) and (1) of the Act. Thereafter, answers to the consolidated complaint were filed by Respondents Grand Pacific Finance Corp. (GPF), Grand Pacific Holding Corp. (GPH), Southfield Hotel Holding, Inc. d/b/a Ambassador Hotel & Conference Center (SHHI), Southfield Hotel Holdings, L.L.C. d/b/a Ambassador Hotel & Conference Center (SHHLLC), and Global Equities and Loans, Inc. (Global). However, no answers were filed by Respondents Plaza Properties of Michigan, Inc. (PPM) a/k/a Plaza Operations, Inc. d/b/a/ Michigan, Inn (POI), Michigan Inn, Inc. (Michigan Inn), Plaza Properties, Inc. (PPI), and J&M Hotel Management Company, L.L.C. d/b/a Clarion Ambassador Hotel a/k/a Michigan Inn (J&M).

Accordingly, on February 10, 2003, the General Counsel filed a Motion for Partial Default Summary Judgment with the Board with respect to the allegations involving Respondents PPM, POI, Michigan Inn, PPI, and J&M.[1] On February 26, 2003, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. No response was filed by any of the Respondents. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the consolidated complaint affirmatively states that unless an answer is filed within 14 days of service, all the allegations therein will be considered admitted. Further, the undisputed allegations in the General Counsel's motion disclose that the Region, by letter dated October 30, 2002, notified Respondents PPM, POI, Michigan Inn, PPI, and J&M that unless an answer was received by November 14, 2002, a motion for default judgment would be filed. We therefore find that Respondents PPM, POI, Michigan Inn, PPI, and J&M have not shown good cause for failing to file a timely answer.[2]

Nevertheless, we decline to grant the General Counsel's motion for partial default judgment. For the reasons discussed below, we find that a substantial portion of the complaint is ambiguous or inconsistent, thereby making it impossible to determine whether it is appropriate to find that some or all of these Respondents have violated the Act as alleged and what the appropriate remedy should be.

[1] The General Counsel does not seek a default judgment with respect to the allegations against the remaining Respondents, which, as indicated, filed answers to the consolidated complaint. Those allegations allege, inter alia, that Respondent GPF is a successor to Respondents PPI, PPM and POI under *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973), that Respondents GPF, GPH, SHHI, and SHHLLC are a single employer, that Respondent Global and Respondents SHHI and SHHLLC have been joint employers of the employees since April 17, 2001, and that these Respondents violated the Act in various respects.

[2] Copies of the consolidated complaint and October 30 letter served by certified mail on the Respondents were returned indicating that service was refused. However, it is well established that the failure or refusal to accept certified mail or to provide for proper service cannot serve to defeat the purposes of the Act. See, e.g., *I.C.E. Electric, Inc*., 339 NLRB No. 36 (2003); *Michigan Expediting Service*, 282 NLRB 210 fn. 6 (1986).

The Complaint Allegations

The consolidated complaint allegations involving Respondents PPM, POI, Michigan Inn, PPI, and J&M allege, in pertinent part, as follows:[3]

2(a) At all material times until April 4, 2001, Respondents PPM, POI, PPI and Michigan Inn have been affiliated business enterprises with common officers, ownership, directors, management and supervision; have formulated and administered a common labor policy; have shared common premises and facilities; have provided services for and made sales to each other; have interchanged personnel with each other; and have held themselves out to the public as a single integrated business enterprise.

(b) Based on their operations described above, Respondents PPM, PPI, POI and Michigan Inn constitute a single-integrated business enterprise and a single employer within the meaning of the Act.

(c) At all material times until about April 4, 2001, Respondents PPM, POI, PPI, and Michigan Inn, each a corporation with its office and place of business located at 16400 J.L. Hudson Dr., Southfield, Michigan, herein called Respondents' Southfield facility, were engaged in the ownership and operation of a hotel providing food, lodging, a fitness center and pool, and banquet services.

(d) During the calendar year ending December 31, 2000, Respondents PPM, POI, PPI and Michigan Inn, in conducting their business operations described above, collectively realized gross revenues in excess of $500,000; and during that same period of time purchased and caused to be shipped to the Southfield facility goods valued in excess of $50,000, which goods were shipped directly to the Southfield facility from points located outside the State of Michigan.

(e) About April 2001, Respondents PPI, PPO, PPM, Michigan Inn, and J&M, by their agents including Boggie Harlow, Alicja Harlow and Jeff Drizin, signed a covenant deed, buyer's agreement, and deed in lieu of foreclosure for $1.00, after defaulting on loans in excess of $5 million owed to Respondent GPF, thereby turning over all property interest in the Southfield facility to Respondent GPF.

(f) About May 9, 2001, Respondents PPI and PPM, by their agent Boggie Harlow, signed a quit claim deed, thereby turning over the deed to the Southfield facility to Respondent SHHLLC.

3(a) At all material times from about May 2000, until about January 31, 2001, Respondent J&M, a corporation with an office in Chicago, Illinois, and a second office and place of business located at the Southfield facility, was engaged in providing management and labor relations and related services involving the operation of the Southfield facility.

(b) At all material times from about May 2000, until about January 31, 2001, Respondent J&M possessed and exercised control over the labor relations policy of Respondents PPM, POI, PPI, and Michigan Inn with respect to employees employed at the Southfield facility.

(c) At all material times from about May 2000, until about January 31, 2001, Respondent J&M and Respondents PPM, POI, PPI, and Michigan Inn have been joint employers of the employees employed at the Southfield facility.

(d) During the calendar year ending December 31, 2000, Respondent J&M, in conducting its business operations described above, derived revenues in excess of $200,000 and, during that same period of time, purchased and caused to be shipped to the Southfield facility, goods valued in excess of $50,000, which goods were shipped directly to the Southfield facility from points located outside the State of Michigan.

(e) About January 27, 2001, Respondent J&M, by its agent Mort Kouklan, severed its relationship at the Southfield facility and transferred control of the safes, cash, receipts, management and operations of the Southfield facility to Respondents PPI, POI, PPM, and Michigan Inn.

(f) About January 27, 2001, Respondents PPI, PPM and POI resumed management and operation of the Southfield facility, including the renting of hotel rooms and the servicing of long-term leases to various customers.

. . . .

10. The following employees, herein called the unit, constitute a unit appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time kitchen, bar, housekeeping, service, valet parking, laundry, valet department, health club, dining room, banquet, and clerical employees as set forth in Schedules A through F of the collective bargaining agreement effective October 1, 1998, employed at the Southfield, Michigan, facility; but excluding managerial employees, supervisors, confidential employees, guards and all security personnel.

11. Since at least 1995, and at all times material, Local 24, Hotel Employees and Restaurant Employees International Union, AFL–CIO, the Union, has been the exclusive collective-bargaining representative of the unit and has been so recognized by Respondents PPI, PPM,

[3] Allegations involving only Respondents GPF, GPH, SHHI, SHHLLC and Global have been omitted.

POI, Michigan Inn, and J&M. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective from October 1, 1998, through September 30, 2001, and was acknowledged by letter dated October 18, 2000, from Respondent J&M to the Union.

12. At all material times, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

13. Since about October 2000, Respondents have unilaterally changed wages, hours and other terms and conditions of employment, including various provisions of the collective-bargaining agreement described above, without notice to or bargaining with the Union about the changes or the effects, as follows:

(a) Refusing to remit union dues deducted from paychecks of unit employees to the Union.

(b) Failing to make payments into the Union's fringe benefit funds.

(c) Failing to provide unit employees with medical insurance coverage through Blue Cross/Blue Shield.

(d) Subcontracting unit work.

(e) Laying off all unit employees and closing or partially closing the Southfield facility about January 2001.

(f) Evading the collective-bargaining agreement, including the successor clause, and failing to recall laid-off unit employees as provided by the collective-bargaining agreement and past practice.

(g) Failing to apply the terms and conditions of the then current collective-bargaining agreement and past practice to unit employees hired after the closing/partial closing of January 2001, including wages and benefits.

(h) Failing to pay vacation pay accrued for the calendar year 2000 to unit employees, including Marjorey Arrey and Marion Richards.

(i) Failing to pay the complete wages owed to unit employee Irene Johnson in her final paycheck.

14. The Respondents, during all times material herein, have failed to recognize, meet and bargain with the Union with respect to wages, hours, and terms and conditions of employment of Unit employees.

15. The subjects set forth above relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purposes of collective-bargaining.

16. The Respondents engaged in the conduct described in paragraph 13 without notice to and/or without affording the Union an opportunity to bargain with the Respondents with respect to this conduct and/or the effects of this conduct.

17. The Respondents engaged in the conduct described above in paragraphs 13, 14 and 16 in retaliation for employees' activities on behalf of and support for the Union; and/or to evade a [May 28, 1999] Board Order [unpublished] and Sixth Circuit U.S. Court of Appeals Enforcement Order [191 F.3d 452 (Table)] in Cases 7–CA–41510(1), 7–CA–41510(2), 7–CA–41650, and 7–CA–41748;[4] and/or to evade payment pursuant to the Union's lawsuit involving unpaid contractual fringe benefits due prior to June 2000; and/or to discourage employees from engaging in union activities and membership.

18. About January 17, 2001, the Union, in writing, to Respondents PPM, PPI, Michigan Inn, & J&M, requested information regarding:

(a) The announced January 24, 2001, closing of the Southfield facility and the effect on bargaining unit employees.

(b) Financial information.

19. About February 5, 2001, the Union, by its attorney, during a telephone conversation with Respondent J&M, requested the following information with respect to the Southfield facility:

(a) Financial information.

(b) Documents regarding the hotel's current status, including who is operating the hotel.

(c) The names and addresses of all unit employees.

(d) The date that health insurance payments were last made.

20. About February 13, 2001, the Union, by its attorney, in writing to Respondents PPI, PPM, POI, Michigan Inn, and J&M, repeated its requests for the information described in paragraphs 18 and 19.

21. About May 15, 2001, the Union, by its attorney, in writing to the attorney for Respondents GPF, GPH, SHHI, and SHHLLC, requested the following information:

(a) Information regarding the ongoing activities at the Southfield facility.

(b) Whether new bargaining unit employees had been hired.

(c) Information as to the wages, hours and working conditions of any unit employees currently employed.

22. The information requested by the Union as described in paragraphs 18 through 21 is necessary for, and relevant to, the Union's performance of its duties as exclusive collective-bargaining representative of the unit.

23. Since January 17, 2001, the Respondents have failed to provide the requested information.

[4] The Board's May 28, 1999 consent order, issued pursuant to a formal settlement, addressed numerous allegations involving the Southfield unit, and included, among other things, an affirmative bargaining order.

24. By the acts described above in paragraph 13, Respondents unilaterally and without the consent of the Union, have modified the collective bargaining agreement for unit employees described above in paragraph 11 without having complied with the requirements of Section 8(d) of the Act.

25. By the conduct described in paragraphs 13, 14, 16 and 17, Respondents have been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Sections 8(a)(1) and (3) of the Act.

26. By the conduct described above in paragraphs 13, 14, 16, 17, 23 and 24, Respondents have been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees including in violation of Section 8(d) of the Act and in violation of Section 8(a)(1) and (5) of the Act.

27. The unfair labor practices of Respondents described above affect commerce within the meaning of Sections 2(6) and (7) of the Act.

Analysis

As outlined below, we find that a significant number of the foregoing complaint allegations are insufficient to determine whether it is appropriate to find the alleged violations and what the appropriate remedy should be.

1. The complaint fails to specify which Respondents committed which violations.

The complaint refers to all of the Respondents -- not only Respondents PPM, POI, Michigan Inn, PPI, and J&M (hereafter referred to as the "predecessor Respondents"), but also Respondents GPF, GPH, SHHI, SHHLLC and Global (hereafter referred to as the alleged "successor Respondents") -- as the "Respondents". Thus, read literally, paragraphs 13-27 of the complaint allege that all of the Respondents committed all of the alleged violations. This cannot be so. For example, the layoff/closure allegedly occurred in January 2001, i.e. before the successors took over the hotel, and yet they are accused of that conduct. Similarly, a refusal to provide information allegedly occurred on May 15, 2001, i.e. after the predecessors were no longer operating the hotel, and yet they are accused of that conduct.

2. The complaint fails to specify the dates when many of the alleged violations occurred.

With respect to those allegations that have specific dates, we could reasonably assume that they apply only to the Respondents who were in control on those dates. However, not all of the allegations have specific dates. Complaint paragraph 13 alleges that all of the unilateral changes set forth therein occurred "since October 2000". As indicated above, it is relatively clear that some of these allegations, including the layoff and closure (which the charge alleges occurred on January 24, 2001, and the complaint alleges occurred about January 2001), began before the alleged successor Respondents assumed control. This may also reasonably be assumed with respect to the failure to remit dues, to make fringe benefit payments, and to provide medical insurance, which were alleged in the Union's original January 31, 2001 charge.

However, no similar assumption can reasonably be made with respect to the allegations involving the subcontracting of unit work,[5] failure to recall laid-off unit employees as provided by the collective bargaining agreement and past practice, failure to apply the agreement and past practice to unit employees hired after the closure/partial closure, failure to pay accrued vacation pay for 2000, and failure to pay complete wages to a unit employee in her final paycheck. These allegations were not specifically alleged in the charges and no specific date is given in the complaint.

3. The complaint contains inconsistent allegations regarding when the predecessor Respondents ceased managing and controlling the facility.

Complaint paragraphs 2(c) and 2(e) allege that predecessor Respondents PPM, POI and PPI "owned and operated" the hotel until April 4, 2001, when they and the other predecessor Respondents turned over all property interest to GPF. However paragraph 4(g) alleges that GPF assumed "control and management" of the facility on February 1, 2001, by virtue of its position as the first secured creditor of the property.[6] The difference in dates may be significant, since, as indicated above, some of the alleged unlawful conduct (failure to recall laid-off employees and to apply the contract and past practice to newly hired employees) clearly occurred after the January 2001 layoff and closure.

The complaint also alleges conflicting dates when predecessor Respondent J&M (the alleged joint employer management company) severed its relationship with the hotel. Paragraph 3(e) alleges that this occurred on January 27, 2001. However, paragraph 3(b) alleges that J&M exercised control over labor relations until January 31.

[5] Although this allegation is listed before the alleged layoff and closure/partial closure, it is not clear that the allegations are listed in chronological order.

[6] Paragraph 4(g) alleges that:

> About February 1, 2001, Respondent GPF, by virtue of its position as first secured creditor of the property, assumed control and management of the Southfield facility due to Respondents PPI, PPM, POI, & J&M's failure to meet its first mortgage obligations to Respondent GPF; and since then GPF and its affiliated corporations have continued to operate the Southfield facility in basically unchanged form.

Again, the difference in dates may be significant, depending on whether the layoff and closure occurred before January 27.[7] Further, regardless of whether J&M severed its relationship with the facility on January 27 or 31, these allegations raise a substantial question whether it would be appropriate to find that J&M committed the alleged violations that occurred after the January 2001 layoff and closure.

4. The complaint allegations are insufficient to find that the predecessor Respondents unlawfully laid off all unit employees and closed or partially closed the facility.

As indicated above, the complaint alleges that the predecessor Respondents laid off all the unit employees and closed or partially closed the facility about January 2001. The complaint alleges that this conduct violated both Section 8(a)(3) and Section 8(a)(5).

We find that the complaint allegations are insufficient to determine whether the layoff and closure/partial closure violated the Act as alleged. A decision to cease business entirely is not an unfair labor practice even if motivated by antiunion considerations. *Textile Workers v. Darlington Mfg. Co*., 380 U.S. 263 (1965). Further, a partial closure is a violation of Section 8(a)(3) only if motivated by a purpose of chilling unionism at the employer's remaining operations. *Id*. And an employer's decision to close part of its business for purely economic reasons is not a mandatory subject of bargaining. *First National Maintenance v. NLRB*, 452 U.S. 666 (1981).

There are a number of recognized exceptions to the above principles. For example, a closure may violate the Act if it resulted from the unlawful subcontracting of unit work. See *Westchester Lace, Inc*., 326 NLRB 1227 (1998); *Carter & Sons Freightways*, 325 NLRB 433, 438 (1998); *Joy Recovery Technology Corp.*, 320 NLRB 356 (1995), enfd. 134 F.3d 1307 (7th Cir. 1998); *Ferragon Corp*., 318 NLRB 359, 360-362 (1995), enfd. 88 F.3d 1278 (D.C. Cir. 1996) (Table); and *Lear Siegler, Inc.,* 295 NLRB 857, 860 (1989). See also *Handi-Bag, Inc*., 267 NLRB 221 (1983) (default judgment proceeding). The same is true if the closure is only temporary rather than permanent. See *Bruce Duncan Co., Inc. v. NLRB*, 590 F.2d 1304, 1307 (4th Cir. 1979) (Court's reasoning in *Darlington* is only applicable when the closing of the plant is an actual closing and not a temporary suspension of operations); *NLRB v. Southern Plasma Corp*., 626 F.2d 1287, 1292 (5th Cir. 1980) (*Darlington* does not permit an employer to close his business temporarily and then reopen it in order to oust the union); see also *Gallup, Inc*., 334 NLRB 366 (2001), aff'd. ___ F.3d ___ (5th Cir. 2003) (Table).

However, it is at best unclear whether these exceptions apply here. Thus, although the complaint alleges that the Respondents subcontracted unit work in violation of Section 8(a)(3) and (5), it is not clear that the layoff and closure was related to the subcontracting. The complaint sets forth the subcontracting and the layoff/closure allegations in separate paragraphs, does not describe the extent of the subcontracting, and does not specifically allege that the layoff and closure resulted from the subcontracting.[8] Further, given that the facility is a hotel, it is doubtful the subcontracting could have led to the complete closure of the facility. This is not a situation where the service could be performed offsite. Thus, an employer might layoff all of its hotel employees after subcontracting the hotel operations, but it would not normally close the hotel itself. If the hotel was closed, it is hard to see how the "work [could be] continued by independent contractors." *Darlington*, supra, 380 U.S. at 272, fn. 16.

The complaint alternatively alleges that the Respondents only "partially closed" the facility about January 2001. However, it alleges that *all* of the unit employees were laid off, and the unit description is quite broad.[9]

With respect to whether the closure was permanent or temporary, it might reasonably be concluded that the hotel reopened after January 2001, given the allegation that the Respondents failed to recall employees in accord with the collective bargaining agreement and past practice and to apply the agreement and past practice to newly hired employees after January 2001.[10] However,

[7] As discussed infra, fn. 10, it is not clear that the hotel closed prior to January 27, 2001.

[8] As indicated above, it is not even clear that the subcontracting occurred before the predecessor Respondents relinquished management and control of the hotel.

[9] As indicated above, the unit includes all full-time and regular part-time kitchen, bar, housekeeping, service, valet parking, laundry, valet department, health club, dining room, banquet, and clerical employees as set forth in Schedules A through F of the collective bargaining agreement effective October 1, 1998.

[10] See also Para. 3(f) of the complaint, which alleges that, about January 27, 2001 [the date Respondent J&M, the alleged joint-employer management company, severed its relationship at the facility], Respondents PPI, PPM, and POL "resumed management and operation of the Southfield facility, including the renting of hotel rooms and the servicing of long-term leases to various customers." However, the Respondents may have been utilizing its supervisors and other nonunit personnel to honor previous rentals or leases, rather than resuming operations. See *Darlington*, supra, 380 U.S. at 273 fn. 17 (noting that Darlington accepted no new orders, and merely continued operations for a time to fill pending orders). Further, as noted earlier, it is not clear that the hotel had closed prior to January 27, 2001. Although the charge alleges that it closed on or about January 24, 2001, and the Union's January 17, 2001 information request indicates that the closing was announced for January 24, 2001, the complaint alleges only that it closed "about January 2001." Finally, if the closure did occur on

as indicated above, it is not clear whether this occurred before the hotel was taken over by the alleged successor Respondents.

Finally, assuming the predecessor Respondents did permanently close the hotel (prior to the transfer of ownership and control) and that the closure and layoff were unrelated to the subcontracting, the complaint is insufficient to find a violation under *Darlington* and *First National Maintenance*. The complaint does not specifically allege that the facility was closed to chill unionism among other employees or facilities. Further, neither the complaint nor the motion reveal whether the predecessor Respondents even had any other employees or facilities. Thus, it is also not clear whether or not they ceased business entirely after the Southfield facility was closed.

In these circumstances, we find that a default judgment with respect to the alleged 8(a)(3) and (5) layoff and closure/partial closure is inappropriate. See *Cannon Valley Woodwork, Inc*., 333 NLRB No. 97 (2001) (not included in bound volume) (denying default judgment to the extent 8(a)(5) complaint alleged a failure to bargain over decision to close plant, as "the bare assertions of the complaint do not support a cause of action given the Supreme Court's decision in *First National Maintenance*"); *Rio Piedras Mfg. Corp*., 236 NLRB 1198 (1978) (denying default judgment to the extent complaint alleged 8(a)(3) plant closure since General Counsel had failed to allege "facts, not disputed by an answer, showing that Respondent was continuing operations at other facilities," as required by *Darlington*).[11]

5. The complaint and motion fail to explain the basis for finding that the predecessor Respondents' other alleged 8(a)(5) conduct also violated 8(a)(3).

As indicated above, the complaint alleges that all of the Respondents' other conduct, except for the failure to provide information, also violated both Section 8(a)(3) and Section 8(a)(5). Although the predecessor Respondents have not answered the complaint, and the 8(a)(3) allegations are therefore admitted, it would be unusual to find an 8(a)(3) violation for generally refusing to recognize and bargain with the Union and for at least some of the other alleged unilateral conduct, such as failing to remit dues and to make benefit fund contributions. The complaint and motion provide no explanation why it would be appropriate to find such violations here.

6. The complaint and motion also raise a number of remedial issues.

Even if we were to grant a default judgment in this case against the predecessor Respondents, there would be substantial questions about the appropriate remedies.

(a) The complaint and motion request a reinstatement order as a remedy for the alleged unlawful January 2001 layoff.[12] If we were to impose such a remedy here against the predecessor Respondents, we would, in effect, be ordering them to restore their prior operations. Such a restoration order is normally appropriate where the Board finds a plant closure violation, unless the respondent shows that restoration would be unduly burdensome. See, e.g., *Westchester Lace, Inc.,* supra, 326 NLRB at 1245; *Carter & Sons Freightways*, supra, 325 NLRB at 441; *Joy Recovery*, supra, 320 NLRB at 356 fn. 4; *Ferragon Corp*., supra, 318 NLRB at 362-363; *Lear Siegler, Inc*., supra, 295 NLRB at 861.

Here, however, the complaint itself (para. 2(e)) alleges that the predecessor Respondents defaulted on loans in excess of $5 million, and thereafter turned over all property interest in the facility to Respondent GPF in April 2001. Thus, the complaint itself raises a substantial issue whether these Respondents have either the resources or the independent ability at this time to resume the hotel operations. Cf. *Douglas Foods Corp*., 251 F.3d 1056 (D.C. Cir. 2001), denying enf. in relevant part of 330 NLRB 821 (2000) (denying enforcement of restoration order given that respondent had sold its trucks and routes).

Further, if we did not order the predecessor Respondents to resume operations, then this would impact on other remedies. For example, an immediate reinstatement order could also not be issued for the alleged failure-to-recall violation. See also the discussion of the subcontracting remedy below.

(b) The complaint does not indicate whether any employees were laid off as a result of the unlawful subcontracting, and neither the complaint nor the motion indicate whether a reinstatement remedy is sought for this alleged violation. Thus, it is not clear whether a reinstatement order would be appropriate. Compare *Thermaglas*, 317 NLRB No. 133 (1995) (not included in bound volume) (in default judgment proceeding, order-

January 24, and the closure was only for three days (until January 27), we think it likely that the complaint would have alleged a "temporary shutdown" or "temporary closure," rather than a closure.

[11] But cf. *Atlantic Brands, Inc.,* 297 NLRB No. 22 (1989) (not included in bound volume) (granting default judgment and finding 8(a)(5) plant closure/layoff violation).

[12] The General Counsel has not requested a limited backpay remedy under *Transmarine Navigation Corp*., 170 NLRB 389 (1968), for the failure to bargain over the effects of the closure and layoff. Where a restoration and reinstatement order are issued, such a remedy is normally not appropriate. See *Westchester Lace*, supra, 326 NLRB at 1227 fn. 2 (such relief would be cumulative); see also *Ferragon Corp*., supra; and *Lear Siegler*, supra. But cf. *Atlantic Brands*, supra (including such a remedy at General Counsel's request because it was not clear whether the closure and layoffs were temporary or permanent).

ing recall of employees laid off as a result of transfer of work to alter ego's facility), with *Unique Services*, *Inc*., 309 NLRB No. 126 (1992) (not included in bound volume) (in default judgment proceeding, ordering only a make whole remedy for unlawful relocation of work to another facility).

(c) Finally, as indicated above, the complaint appears to contain inconsistent allegations regarding when alleged successor Respondent GPF assumed management and control of the hotel. Complaint paragraphs 2(c) and (e) indicate that the date was April 4, 2001, while paragraph 4(g) indicates that the date was February 1, 2001. Without any basis to resolve this conflict, we would be unable to determine in our order when the predecessor Respondents' unlawful unilateral conduct, and make-whole liability therefor, terminated.

In sum, we find that a substantial portion of the complaint is ambiguous or inconsistent, and that it is therefore impossible to determine whether some or all of the predecessor Respondents violated the Act as alleged or what the appropriate remedy would be. Thus, notwithstanding the absence of an answer by Respondents PPM, POI, Michigan Inn, PPI, and J&M, under all the circumstances, including the unusual nature of the alleged violations, and the significant ambiguities, inconsistencies, and remedial issues outlined above, we find that it would not be appropriate at this point to grant the General Counsel's motion for partial default judgment. Rather, we find that the appropriate course is to remand the entire proceeding for further appropriate action. See *R.L. Broker & Company*, 274 NLRB 709 (1985) (denying General Counsel's motion for default judgment in its entirety and remanding case to Regional Director for further appropriate action because a substantial portion of the complaint allegations were internally inconsistent and failed to provide sufficient information to determine whether the respondent violated Section 8(a)(1) and (5) and Section 8(d) of the Act, as alleged).

In his dissent, our colleague asserts that the complaint allegations are "well pleaded" and that a remand is therefore unwarranted. However, the Board has repeatedly held that a complaint is not well pleaded if the allegations are too vague or inconsistent to determine if a violation occurred or liability should be imposed. See, e.g., *Parks International Corporation*, 339 NLRB No. 40 (2003) (Board declined, in default judgment proceeding, to impose liability for alleged discharges on alleged joint employer since complaint was at best ambiguous as to whether it sought to impose such liability and the complaint allegations failed to allege that the discharged employees were part of the jointly managed workforce); *St. Regis Hotel*, 339 NLRB No. 25 (2003) (Board denied motion for default judgment and remanded complaint for further appropriate action to the extent it alleged that the respondent unlawfully failed to provide the union with requested information relating to "other matters important to the Union," as neither the complaint nor the motion described what those "other matters" were); *Jet Electric*, 334 NLRB 1059 (2001) (Board declined, in default judgment proceeding, to order instatement and backpay as a remedy for the respondent's refusal-to-hire violations in the absence of an allegation in the complaint that there were sufficient openings available for the discriminatees); *Cakemasters Corp*., 312 NLRB 1150, 1151 n. 6 (1993) (Board declined to grant default judgment with respect to complaint allegation that the respondent made changes relating to wages, hours and terms and conditions of employment, "the exact nature of which are presently unknown to the General Counsel," because the complaint did not identify the changes that were allegedly made); and *R.L. Broker*, supra. See also *In re Industrial Diamonds Antitrust Litigation*, 119 F.Supp 2d 418, 420 (S.D. N.Y. 2000) ("A fact is not 'well pleaded' if it is inconsistent with other allegations of the complaint or with facts of which the court can take judicial notice.")

Our colleague also attempts to trivialize the ambiguities and inconsistencies in the General Counsel's complaint. However, he does so by either assuming facts that are unsupported by the complaint, or by ignoring the ambiguities and inconsistencies altogether. For example, our colleague asserts that the General Counsel is obviously not seeking to impose liability on the predecessor Respondents for conduct occurring after they transferred control. However, the General Counsel's complaint alleges otherwise, and, in any event, the complaint alleges inconsistent dates with respect to when they transferred control (February 1 and April 4, 2001). Our colleague concedes the inconsistent dates, but assumes that February 1 is simply an inadvertent error because April 4 is alleged more often. We decline to speculate as to which is correct, particularly since the choice of dates could affect the determination whether one or more of the Respondents violated the Act.

Our colleague also notes that the complaint specifically alleges that predecessor Respondents PPI, PPM, and POI resumed management and control of the facility about January 27, 2002 (one of the two alleged dates that predecessor Respondent J&M, the alleged joint-employer management company, severed its relationship with the hotel).[13] He further notes that all the predecessor Re-

[13] Our colleague makes light of the fact that the discrepancy between the alleged dates (January 27 and January 31) is only four days, stating that this "does not warrant further comment." However, as discussed

spondents (including J&M, notwithstanding that it was allegedly no longer associated with the facility) allegedly violated the Act at some time after the layoff and closing or partial closing by not recalling laid-off employees and failing to pay employees who were hired contractual wages and benefits. Based on these allegations, our colleague concludes that the complaint "plainly alleges" that the hotel continued to operate and that the so-called closure was nothing more than a sham to evade the application of the collective-bargaining agreement. However, aside from the aforementioned problems with the above allegations, our colleague ignores the fact, discussed more fully above (see fns. 7 and 10 and accompanying text), that the complaint does not allege whether the closure occurred before or after January 27, 2002. Further, it alleges that the alleged successor Respondents committed all of the same violations. Again, we decline to join our colleague in speculating as to the meaning of these ambiguous and/or inconsistent allegations.

Our colleague also argues that our concerns about ordering the predecessor Respondents to resume operations and reinstate the laid-off employees are mistaken. However, his arguments are premised on his unfounded assumptions addressed above.

Finally, our colleague expresses concern that our remand will further delay a remedy for the employee-victims of the predecessor Respondents' alleged unfair labor practices. We share our colleague's concern about delay. However, to paraphrase Judge Posner in *NLRB v. Brooke Industries Inc.*, 867 F.2d 434, 435-436 (7th Cir. 1989), we are also properly concerned with the "integrity and manageability of the [administrative] process;" we reject our colleague's suggestion (in the words of Judge Posner) that "we have no choice but to rubber stamp" the General Counsel's motion for default judgment in these circumstances.[14] Moreover, the ambiguities and inconsistencies we have outlined above may be promptly addressed on remand by issuance of an amended complaint. The General Counsel may thereafter either file a renewed motion for default judgment with the Board,[15] or raise the issues with the administrative law judge at a hearing on the consolidated allegations.

ORDER

IT IS ORDERED that the General Counsel's motion for partial default judgment is denied, and that the proceeding be remanded to the Regional Director for Region 7 further appropriate action.

Dated, Washington, D.C. October 31, 2003

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER WALSH, dissenting.

"[R]elief delayed under the Act may be relief denied."—Vincent Industrial Plastics, Inc. v. NLRB, 209 F.3d 727, 739 (D.C. Cir. 2000).

In denying the General Counsel's uncontested motion for partial default judgment and sending this case back to the drawing board, the majority opinion unjustly delays any remedy for the innocent victims of the unfair labor practices committed by multiple wrongdoers three years ago. Contrary to my colleagues, I would grant the General Counsel's motion, which seeks default judgment against only the five Respondents ("the predecessor Respondents") that have failed to answer the complaint, and I would provide the General Counsel the relief he seeks.[1]

Procedural Background

The complaint alleges in substance that four of the predecessor Respondents, a single employer, were engaged in the operation of a hotel in Southfield, Michigan.[2] Despite executing a formal Board settlement

above, the difference in dates could determine whether alleged predecessor Respondent J&M violated the Act, as alleged in the complaint, with respect to the layoff and closure or partial closure (which allegedly occurred "about January 2001"), as well as the other alleged violations, which are undated.

[14] In *Brooke Industries*, Judge Posner declined to enter a consent judgment because the language in the proposed consent judgment was insufficiently clear to permit its enforcement through contempt proceedings.

[15] Nothing herein requires a hearing if, in the event of an amendment to the consolidated complaint, the predecessor Respondents again fail to answer, thereby admitting evidence that would permit the Board to find the alleged violations against them and determine the appropriate remedy. In such circumstances, the General Counsel may file with the Board a renewed motion for partial default judgment with respect to the amended consolidated complaint allegations. In that event, however, the General Counsel should clearly set forth in the motion the appropriate relief being sought against Respondents PPM, POI, Michigan Inn, PPI, and J&M, for the violations alleged in the amended consolidated complaint.

[1] The General Counsel does not seek default judgment against the remaining five Respondents ("the successor Respondents") that have answered the complaint.

[2] These Respondents are: PPM, POI, Michigan Inn, and PPI. A fifth Respondent, J&M, a corporation engaged in providing management and labor services to the hotel during a nine-month period, is alleged to be a joint employer with the four entities constituting the single employer.

agreement in May 1999, which resulted in a Board Order enforced by the Sixth Circuit later that year,[3] these Respondents are alleged to have violated the Act beginning in October 2000 and continuing until April 2001, when they ceased controlling the facility and the successor Respondents began operations. Specifically, the complaint alleges that the predecessor Respondents committed the following numerous and serious unfair labor practices in violation of Section 8(a)(5), (3), and (1):

- Refusing to remit dues to the Union;
- Failing to make benefit fund payments;
- Failing to provide employees with medical insurance coverage;
- Subcontracting unit work;
- Laying off all unit employees and "closing or partially closing" the hotel about January 2001;
- Evading the collective-bargaining agreement and failing to recall laid-off employees;
- Failing to apply the collective-bargaining agreement to the employees hired after the "closing/partial closing" in January 2001;
- Failing to pay employees accrued vacation pay for calendar year 2000;
- Failing to pay the complete wages owed to unit employee Irene Johnson.

The predecessor Respondents are alleged to have engaged in this conduct in violation of their duty to bargain with the Union, in retaliation for the employees' activities on behalf of the Union, and in an effort to evade the prior Board and court Orders.[4]

Although duly served with copies of the complaint and a "reminder letter" from the General Counsel, the predecessor Respondents failed to file an answer. Section 102.20 of the Board's Rules provides that the allegations in the complaint shall be deemed admitted if no timely answer is filed, unless good cause is shown. Accordingly, the General Counsel filed a motion for partial default judgment with the Board, requesting that all allegations of the complaint be deemed to be admitted to be true with respect to the predecessor Respondents. Thereafter, the Board issued a notice to show cause why the motion should not be granted, but no response was filed by any of the predecessor (or successor) Respondents.

My colleagues concede that the predecessor Respondents have not shown good cause for failing to file a timely answer to the complaint. Nevertheless, they deny the General Counsel's motion for partial default judgment on the ground that "a substantial portion of the complaint is ambiguous or inconsistent, and that it is therefore impossible to determine whether some or all of the predecessor Respondents violated the Act as alleged or what the appropriate remedy would be." As discussed below, my colleagues are mistaken.

Legal Framework

In *Artesia Ready Mix Concrete*, 339 NLRB No. 159, slip op. at 3 (2003), a no-answer case that issued just months ago, the Board summarized the relevant principles, as follows:

> Section 102.15 of the Board's Rules and Regulations requires only that a complaint contain "a clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed." Applying this rule, the Board and the courts have consistently found that an unfair labor practice complaint is not judged by the strict standards applicable to certain pleadings in other, different legal contexts.

The Board then cited numerous court decisions endorsing this approach. E.g., *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1169 (D.C. Cir. 1993), cert. denied 511 U.S. 1003 (1994) (complaint need not include legal theory); *Curtiss-Wright Corp., Wright Aeronautical Division v. NLRB*, 347 F.2d 61, 72 (3d Cir. 1965) (complaint "need state only the manner by which the unfair labor practice has been or is being committed"); *American Newspaper Publishers Assn. v. NLRB*, 193 F.2d 782, 800 (7th Cir. 1951), affd. 345 U.S. 100 (1953) ("the accomplishment of the broad purposes of the Act should not be hindered nor prevented by technicalities in procedure"); *NLRB v. Red Arrow Freight Lines, Inc*., 180 F.2d 585, 587 (5th Cir. 1950), cert. denied 340 U.S. 823 (1950) ("strictness of common law pleading" inapplicable); *Consumers Power Co. v. NLRB*, 113 F.2d 38, 43 (6th Cir. 1940) ("[m]atters of evidence need not be recited in the complaint"). In sum, as the Sixth Circuit, the circuit in which this case arises, stated over 60 years ago:

> The sole function of the complaint is to advise the respondent of the charges constituting unfair labor practices as defined in the Act, that he may have due notice and a full opportunity for hearing thereon. The Act does not require the particularity of pleading of an in-

[3] *Michigan Inn,* Case 7–CA–41510 (May 28, 1999) (not included in bound volumes), enfd. 191 F.3d 452 (6th Cir. September 24, 1999) (table). The Board's court-enforced Order, inter alia, required predecessor Respondents PPM, POI, and Michigan Inn to execute and comply with the terms of the collective-bargaining agreement they reached with the Union, to bargain with the Union on request, to make delinquent benefit fund contributions, and to make employees whole for their losses.

[4] In addition, the complaint alleges that the predecessor Respondents violated Sec. 8(a)(5) and (1) by failing to provide the Union with relevant and necessary information.

> dictment or information, nor the elements of a cause like a declaration at law or a bill in equity. All that is requisite in a valid complaint before the Board is that there be a plain statement of the things claimed to constitute an unfair labor practice that respondent may be put upon his defense.

NLRB v. Piqua Munising Wood Products Co., 109 F.2d 552, 557 (6th Cir. 1940).

Analysis

Measured by these standards, the complaint allegations against the predecessor Respondents are well pleaded, and there is no merit in any of the six objections my colleagues raise sua sponte. I shall address each objection in turn below.

1. "The complaint fails to specify which Respondents committed which violations." This objection is a classic red herring.

As my colleagues concede, the General Counsel is seeking default judgment against only the predecessor Respondents. By not filing an answer, these Respondents have admitted all the violations with which they are charged. The successor Respondents will in no way be prejudiced by a grant of default judgment against the predecessor Respondents, and the successor Respondents do not even oppose the General Counsel's motion. Furthermore, as my colleagues also concede, the General Counsel is obviously not seeking to impose liability on the predecessor Respondents for conduct occurring after they transferred control of the hotel to the successor Respondents. Therefore, the fact that the complaint, "read literally," alleges that "all of the Respondents committed all of the alleged violations" is wholly immaterial to the issue before the Board of whether to grant the General Counsel's uncontested motion seeking default judgment solely against the predecessor Respondents.

2. "The complaint fails to specify the dates when many of the alleged violations occurred." The short answer to this objection is that Section 102.15 of the Board Rules, quoted above, requires only that a complaint contain "approximate" dates "where known." There is no hard and fast requirement to "specify" dates.

3. "The complaint contains inconsistent allegations regarding when the predecessor Respondents ceased managing and controlling the facility." Although true, this objection does not warrant denial of the General Counsel's motion. Ten complaint paragraphs indicate that the successor Respondents began operating the hotel in April 2001.[5] One complaint paragraph indicates that the successor Respondents began operating the hotel in February 2001.[6] In these circumstances, it appears likely that the February 2001 date is merely an inadvertent error. Even if it is not, the exact date that the transfer of control occurred could be determined at the compliance stage.[7]

4. "The complaint allegations are insufficient to find that the predecessor Respondents unlawfully laid off all unit employees and closed or partially closed the facility." This objection is premised on my colleagues' extensive analysis of Board and court "closure cases," including the Supreme Court's decisions in *Textile Workers v. Darlington Mfg. Co.,* 380 U.S. 263 (1965), and *First National Maintenance v. NLRB*, 452 U.S. 666 (1981).

However, the *Darlington* and *First National Maintenance* decisions are inapplicable here because there was no true "closure" of the hotel. Immediately after alleging the January 2001 unlawful layoff of unit employees and the "closing or partial[] closing [of] the Southfield facility," the complaint further alleges that the predecessor Respondents violated the Act by not recalling the laid-off employees, as provided by the collective-bargaining agreement, and by not paying the employees who were hired in accordance with the collective-bargaining agreement. In addition, the complaint specifically alleges that about January 27, 2002, predecessor Respondents PPI, PPM, and POI "resumed management and operation of the Southfield facility." Thus, the complaint, fairly read as a whole, plainly alleges that the hotel continued to operate and that the so-called closure was nothing more than a sham to evade the application of the collective-bargaining agreement, not a genuine cessation of operations. In sum, because there was no bona fide "closure" here, neither *Darlington, First National Maintenance*, nor any of their progeny represent a barrier to granting the General Counsel's motion.

5. "The complaint and motion fail to explain the basis for finding that the predecessor Respondents' other alleged 8(a)(5) conduct also violated 8(a)(3)." As stated above, Section 102.15 of the Board's Rules requires only that a complaint contain "a clear and concise description of the acts which are claimed to constitute unfair labor practices." There is no requirement to "explain the basis" for an alleged violation of the Act. *Davis Supermarkets,* supra, 2 F.3d at 169 (complaint need not include legal theory relied on). In any event, it is unnecessary to pass on whether the predecessor Respondents' 8(a)(5) conduct also violated Section 8(a)(3) because the finding

[5] Paragraphs 2(a); 2(c); 2(e); 4(b); 5(a); 5(b); 5(c); 6(b); 6(c); and 6(d).

[6] Paragraph 4(g).

[7] The majority also claims that two other complaint paragraphs allege "conflicting dates." The discrepancy amounts to a grand total of four days. This objection does not warrant further comment.

of such additional violations would be essentially cumulative with no material effect on the remedy.

6. "The complaint and motion also raise a number of remedial issues."

"(a) The complaint and motion request a reinstatement order as a remedy for the alleged unlawful January 2001 layoff. If we were to impose such a remedy here against the predecessor Respondents, we would, in effect, be ordering them to restore their prior operations."

This objection is premised on the majority's mistaken view, discussed above, that there was a genuine "closing" of the hotel in January 2001. Because there was no such closing, providing a reinstatement order would not be tantamount to ordering the predecessor Respondents "to restore their prior operations." Indeed, the complaint does not challenge the legality of the predecessor Respondents' decision three months later to transfer control of the hotel to the successor Respondents, so the General Counsel is clearly *not* contending that the predecessor Respondents should restore their prior operations. The General Counsel seeks a reinstatement order here for a very different reason; he is contending that the successor Respondents are obligated to remedy the unfair labor practices of the predecessor Respondents and reinstate the unlawfully laid-off employees. The General Counsel's request is consistent with established Board precedent. See, e.g., *I.C.E. Electric, Inc.,* 339 NLRB No. 36 (2003) (respondent that ceased operations ordered to instate three employees unlawfully denied hire in the event the same or similar business operation is resumed); *Top Knotch Plumbing*, 339 NLRB No. 19 (2003) (respondent that permanently ceased operations ordered to reinstate unlawfully discharged employee in the event the same or similar business operation is resumed).

"(b) The complaint does not indicate whether any employees were laid off as a result of the unlawful subcontracting, and neither the complaint nor the motion indicate whether a reinstatement remedy is sought for this alleged violation." The answer to this objection is to provide the Board's "customary [remedy] . . . order[ing] restoration of the status quo ante to the extent feasible," *Detroit News*, 319 NLRB 262 fn. 1 (1995), with "the particulars of that status quo determination" left to be resolved at the compliance stage. *Dean General Contractors*, 285 NLRB 573 (1987).

"(c) Finally, as indicated above, the complaint appears to contain certain inconsistent allegations regarding when [the] alleged successor Respondent[s] . . . assumed management and control of the hotel." As stated above, this "inconsistency" may well be nothing more than an inadvertent error and, in any event, the exact date that the transfer of control occurred could be determined at compliance.

Conclusion

This uncontested case is not half as complicated as my colleagues make it out to be. The predecessor Respondents have admitted all the allegations against them in a proper complaint. The General Counsel is entitled to a summary finding of unlawful conduct. The victimized employees are entitled to be made whole. Now.

Dated, Washington, D.C. October 31, 2003

Dennis P. Walsh, Member

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